

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

In the Matter of:

ALIJAH G.

Claimant,

vs.

HARBOR REGIONAL CENTER,

Service Agency.

OAH Case No. L 2007010045

DECISION

This case was heard by Chris Ruiz, Administrative Law Judge, Office of Administrative Hearings, State of California, at the Harbor Regional Center in Torrance, California, on March 2, 2007, and March 15, 2007.

Claimant's mother (Mom) Margarita R.-G. represented Claimant.¹ Claimant's father (Dad) Armand G. was also present

Steven Roberts, Manager of Rights Assurance, represented the Harbor Regional Center (HRC or the Service Agency.)

Oral and documentary evidence was received. The record was left open until March 22, 2007, in order for the parties to submit closing briefs. Claimant's closing brief was received and marked as Exhibit F-1. HRC's closing brief was received and marked as Exhibit P.

Claimant's opening brief, which was inadvertently not marked during the hearing, was marked as Exhibit E-1. The matter was submitted for decision on March 23, 2007, and this decision was due on April 6, 2007.

ISSUES

1. Shall HRC fund for Claimant 40 hours of applied behavior analysis therapy (ABA) per week, for two weeks during the summer of 2007.

¹ Claimant and his family are referred to by their initials or family titles to protect their confidentiality.

FACTUAL FINDINGS

Jurisdictional Information

1. In November 2006, Claimant requested that HRC fund two weeks of ABA during the summer of 2007.

2. On November 28, 2006, HRC sent a letter to Claimant which denied Claimant's request for funding.

3. On December 15, 2006, Claimant filed a Request for Fair Hearing.

Claimant's Background

4. Claimant is a four year-old boy and is a consumer of HRC pursuant to his diagnosis of autism. Claimant's family presently receives diapers and respite from HRC.

5. Claimant presently receives 40 hours, per week, of one-to-one ABA, provided by the LOVAAS Institute (LOVAAS), and funded by Los Angeles Unified School District (LAUSD). Claimant and LAUSD entered into a settlement agreement in November 2006 wherein LAUSD agreed to fund 40 hours of ABA, per week, for 48 weeks per year. Claimant does not presently attend school.

6. HRC has offered and has authorized funding for ABA for five hours per week, for the next six months (which will likely be extended for the whole 52-week year). This offer equates to 260 hours per year. Claimant is not presently using this ABA offered by HRC. Instead, Claimant would rather use this funding to provide ABA to Claimant during the summer when LAUSD will not fund ABA for Claimant. Claimant seeks funding for 80 hours, which would cover two of the four weeks during the summer when Claimant does not receive funding for ABA from LAUSD.

7. Claimant's parents are concerned that Claimant will regress if he has no ABA for four weeks.² LAUSD's funding ends on July 31, 2007. HRC has not agreed to Claimant's request because it contends that ABA is not necessary for more than 48 weeks per year, or, in alternative, because it believes that LAUSD should fund ABA during the summer if necessary, or because it believes Claimant's request would require HRC to fund ABA that would be used to help Claimant in his educational pursuit, rather than to assist Claimant with his home or community based needs.

8. Claimant has been receiving ABA since June 2006. Claimant receives ABA services six days per week, with Sundays off. When Claimant first began receiving ABA, he

² It was not established why Claimant does not seek funding for the whole summer (i.e. four weeks.)

would regress after he did not have therapy on Sunday. On Monday, Claimant would be more non-responsive, non-compliant, and would protest more.

9. Claimant has difficulty with receptive instruction and verbal limitation. The ABA Claimant receives assists Claimant with communication, socialization, and community involvement, as well as with his school needs.

10. Dr. Carol Bellamy testified that she is unsure what would happen if Claimant did not have any ABA services for an extended period of time. In her opinion, Claimant could regress, but that regression could be minor or significant. In the past, there has not been a long period of time when Claimant has been without ABA services, so there is no historical data upon which she can rely. Dr. Bellamy described Claimant's present ABA program as "excellent" and also stated that the parents are "well-advised" to be concerned about regression during the summer. Dr. Bellamy agrees that Claimant's present program (40 hours per week) is appropriate and she would not remove Claimant from his ABA program for the sole purpose of determining if Claimant suffered any significant regression. Dr. Bellamy is of the opinion that, after age three, the school district is responsible for providing funding for all of a consumer's ABA needs. Assuming Claimant only had five hours, per week, of ABA during the 2007 summer, she described the five hours as "a good start."

11. Both LOVAAS, in a report dated September 1, 2006, and Avazeh Chehrazai, Ph.D., in a report dated March 20, 2006, recommended that Claimant receive ABA for 40 hours, per week, for 50 weeks per year. These two opinions are clear on Claimant's ABA needs, whereas the opinion offered by HRC was not. Therefore, Claimant carried his burden and established his need for a 40 hour per week ABA program for 50 weeks per year.

LEGAL DISCUSSION AND CONCLUSIONS

Jurisdiction & Burdens of Proof

1. The Lanterman Developmental Disabilities Act (Lanterman Act) governs this case. (Welfare and Institutions Code³ §§ 4500 et seq.) A state level fair hearing to determine the rights and obligations of the parties, if any, is referred to as an appeal of the service agency's decision. Claimant properly and timely presented a fair hearing request and otherwise established jurisdiction for this case. (Factual Findings 1-3.)

2. Except as otherwise provided by law, a party has the burden of proof to establish each fact, the existence or nonexistence of which is essential to the claim for relief or defense that he/she/it is asserting. (Evidence Code § 500.) Where a claimant seeks to establish eligibility for government benefits or services not previously funded, the burden of proof is on him. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156,

³ All citations are to the Welfare and Institutions Code unless otherwise noted.

161 (disability benefits); *Greatorex v. Board of Admin.* (1979) 91 Cal.App.3d 54, 57 (retirement benefits).) However, a service agency seeking to change a service previously provided to a claimant has the burden to demonstrate its decision is correct. In this case, Claimant seeks funding for ABA services from the Service Agency. Therefore, Claimant carries the burden of proof.

Responsibility Under the Law to Provide Services

3. The Individuals with Disabilities in Education Act (20 U.S.C. § 1400 et seq.) (IDEA) is a federal law that provides funding for education programs for disabled students in states that choose to participate in that federal program. California has chosen to participate. (Education Code §§ 56340 – 56449.)

4. Persons afflicted with autism are entitled to services under the Lanterman Act, section 4512, subdivision (a), and under IDEA. (20 U.S.C. § 602(3)(b)(i)). Both acts include “education” in defining the services to be provided to qualified persons. (§ 4512, subd. (b); 20 U.S.C. § 602, subd. (8) and (22), which define “free appropriate public education” and “related services.”)

5. IDEA and its special education programs are administered in California by the state's local educational agencies. In this case, that agency is LAUSD. Services and supports for autistic children available under the Lanterman Act are administered by California's Regional Centers, also known as service agencies. In this case, HRC is the service agency.

6. Section 4501 requires the state, through the agency of the regional centers, to provide an array of services and supports which is sufficiently complete to meet the needs and choices of each person with developmental disabilities. In order to achieve this goal, section 4646, subdivision (b), requires that an Individual Program Plan (IPP) or Individual Family Service Plan (IFSP) to be developed for all consumers within 60 days of the determination of eligibility. It is the Service Agency's responsibility to ensure that the IPP or IFSP process is accomplished. When agreement cannot be reached on all aspects of the IPP or IFSP, those services on which the parties agree can be implemented while disagreement about disputed services are being resolved.

7. Claimant and LAUSD entered into a settlement agreement in November 2006, where, in pertinent part, the parties agreed LAUSD would fund 40 hours, per week, for a 48-week calendar year. (Factual Finding 5.)

8. The critical evaluation in this case is what ABA services are necessary, if any, for Claimant during the summer of 2007. Claimant is not presently scheduled to receive any ABA services from LAUSD for four weeks beginning on August 1, 2007. It was established that Claimant's parents have fully sought funding from LAUSD. Claimant is not merely attempting to avoid utilizing LAUSD so as to make HRC fund Claimant's needs. Therefore, HRC's argument that LAUSD should fund services related to Claimant's academic needs is

generally true, but inapplicable in this case. The fact remains that LAUSD is not presently committed to provide services to Claimant during the summer of 2007. That being the case, the Service Agency is not, therefore, precluded by section 4648, subdivision (a)(8), from funding support for ABA, if needed, because there is no evidence that such expenditure will “supplant” the special education budget of the school district. (Factual Findings 4-11.)

9. In general, in rendering services of education and training for autistic persons over the age of three years, it is the primary responsibility of the school district to use its available funds for such purpose, with ultimate responsibility for any unmet needs to be funded by the service agency (§ 4648, subd. (f); and compare IDEA, § 602, subd. (8) and (22), with §§ 4512, subd. (b), 4648 subd. (a)(8), and 4648 subd. (f)).

10. Here, there is an upcoming unmet need. Claimant is not presently scheduled to receive services from LAUSD in the summer of 2007. Funding for this unmet need, sufficient to meet the established needs of this Claimant, is the responsibility of the HRC (§§ 4500, 4501 and 4648, subd. (f)).

HRC’s Contentions

11. The Service Agency’s denial of the request for agency funding for ABA predicated on its contentions that:

- a. ABA is primarily educational in nature, and funding of an educational program is the duty of the school district, not the Service Agency; and
- b. The local school district, as a “generic” resource for funding educational programs, should be pursued before the Service Agency is asked to provide such services; and
- c. ABA is not necessary for Claimant for more than 48 weeks per year.

12. The Service Agency starts with the generally accepted premise that Claimant’s school district is responsible for providing him with educational services. The Service Agency then defines the word “educational” to encompass any activity that involves learning. Applying this definition to ABA, the Service Agency contends that the majority of the ABA that Claimant seeks is educational. Therefore, the Service Agency concludes, since ABA is mostly educational, the school district is the agency legally required to provide the majority of such services to Claimant. HRC also contends that it is prohibited from funding ABA related to education by section 4648, subdivision (a)(8), which prohibits regional centers from using their funds to supplant those of a “generic” agency such as the school district.

13. The Service Agency’s contentions are not convincing. The definition of education that the Service Agency is using is too broad. If this definition of education was applied to all of the Service Agency’s school-aged consumers, the result would be to

effectively eliminate any responsibility to provide services to its school-aged consumers. Such a reading is clearly at odds with the mandate of the Lanterman Act.

14. ABA can assist Claimant because, without successful behavior modification, Claimant will never be successfully integrated into the classroom, which is the ultimate goal of IDEA. It is equally true that, unless Claimant's behavior is successfully modified, he will never be able to be successfully integrated into the community, which is the goal of the Lanterman Act. Ultimately, it is the Service Agency's obligation to see that Claimant receives the supports and services he needs to be a functioning member of society, if possible.

15. In fact, the Lanterman Act specifically contemplates such a responsibility. Section 4512, subdivision (b), provides a definition of the phrase "Services and supports for persons with developmental disabilities." *Inter alia*, the section states:

Services and supports listed in the individual program plan may include, but are not limited to, diagnosis, evaluation, treatment, personal care, day care, domiciliary care, special living arrangements, physical, occupational and speech therapy, training, education, supported and sheltered employment, mental health services, recreation, counseling . . . protective and other social services, follow-along services, adaptive equipment and supplies, advocacy assistance . . . social skills training; . . . (Emphasis added.)

16. Another difficulty with HRC's position is that it assumes that the school district is required by IDEA to make available to the consumer the same level of services and supports as the regional center is required to provide by the Lanterman Act. That assumption is incorrect. In *Hendrick Hudson Dist. Bd. Of Ed. v. Rowley* (1982) 458 U.S. 176, the Supreme Court considered the level of services which the federal law mandated and held: "Insofar as a State is required to provide a handicapped child with a 'free appropriate public education,' we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction."

17. In contrast, the Lanterman Act envisions a much higher standard and requires regional centers, as the agents of the state, to provide developmentally disabled people with those services and supports that will allow them, "regardless of age or degree of disability, and at each stage of life" to integrate "into the mainstream life of the community" and to "approximate the pattern of everyday living available to people without disabilities of the same age." (§ 4501.) The Act also states that persons with developmental disabilities have the right to treatment and habilitation services and supports which foster the individual's developmental potential and are "directed toward the achievement of the most independent, productive and normal lives possible." (§ 4502.) The Act also contemplates that the regional centers will work with consumers and their families to secure "those services and supports which maximize opportunities and choices for living, working, learning and recreating in the community." (Emphasis added.)

18. Thus, when a generic agency fails or refuses to provide a regional center consumer with those supports and services which are needed to allow that person to maximize their potential for a normal life, the Lanterman Act requires the regional centers to provide the service shortfall.

19. If HRC feels that the school district has failed to provide services to Claimant that IDEA requires it to provide, HRC has the authority to pursue reimbursement under section 4659, subdivision (a), which provides that “the regional center shall identify and pursue all possible sources of funding for consumers receiving regional center services. These sources shall include, but not be limited to, . . . (1) Governmental or other entities or programs required to provide or pay the cost of providing services.”

20. It was established that Claimant can benefit, and is benefiting, from the ABA provided by LOVAAS. In fact, HRC’s own expert described this program as “excellent.” The Service Agency presented insufficient evidence to establish that Claimant should not receive ABA services during the summer of 2007, other than its conclusory opinion that 5 hours per week is “a good start.” On the other hand, Claimant established that 50 weeks of ABA is Claimant’s present need. HRC did not establish that Claimant will not regress without the additional two weeks of ABA (Factual Findings 4-11.)

21. In an all-inclusive program such as that provided for Claimant, it is not possible to accurately determine which aspects of the program are “educational” or “cognitive” (and primarily the responsibility of the school district) and which are “adaptive” or “behavioral” (and primarily the responsibility of the Service Agency). There are major components of both incorporated into Claimant’s ABA program and the components cannot be separated; they are inextricably intertwined. Similarly, one cannot divide a child into two independent realms – one cognitive/educational and the other one adaptive/behavioral. Each of those aspects of a child’s being is inextricably intertwined with the other. In any event, as discussed above, Claimant will not be receiving any support from LAUSD during the summer. In such a situation, HRC is required to provide Claimant with sufficient support. HRC may then seek reimbursement from LAUSD. It is also fair to require HRC to fund 80 hours during the summer when HRC is already offering 260 hours for the whole year. Thus, HRC will actually save the expense of funding the remaining 180 hours. In the same vein, it is fair to allow HRC to withdraw its agreement to provide five hours per week of ABA for 52 weeks since Claimant only seeks funding for the summer. (Factual Findings 4-11.)

22. At this time, it is unclear if Claimant will seek funding from LAUSD for additional ABA services during the summer of 2007. It is possible that Claimant will also seek funding for these same expenses from LAUSD. A double recovery would not be fair or equitable. If Claimant receives restitution, reimbursement, or funding, from LAUSD for some or all of the ABA funding that this order requires, HRC should be reimbursed by Claimant. (Factual Findings 4-11; Legal Conclusions 19 and 21.)

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

1. Claimant's request for funding by the Service Agency for 80 hours of ABA, consisting of 40 hours per week for two weeks, during the summer of 2007, provided by LOVAAS, is granted.

DATED: April __, 2007

CHRIS RUIZ,
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision pursuant to Welfare and Institutions Code section 4712.5(b)(2). Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.